

**PARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 05-0121P
Withholding Tax
For Period 06/01/2003 – 11/30/2003**

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ISSUE

I. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b)(c).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer was assessed a 10% negligence penalty for the late payment of Withholding Taxes for the periods ending 01/31/2003 through 11/30/2003. The initial protest of the liabilities was filed on January 5, 2004. At the time the protest was filed, the statutory time limitation to protest the notices issued for the periods ending 01/31/2003-05/31/2003 had passed. Therefore, this Letter of Findings will only address the protest for the periods ending 06/30/2003-11/30/2003.

The taxpayer's filing status was changed from a monthly filer to an early filer effective 01/31/2003. A letter from the Department to the Taxpayer advising the taxpayer of the change in its filing frequency was mailed to the address of record on 01/02/2003.

I. Tax Administration- Ten Percent (10 percent) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10 percent) negligence penalty imposed for the late filing of its withholding tax returns pursuant to IC 6-8.1-10-2.1.

The taxpayer's protest is twofold. First the taxpayer states it did not receive the notification from the Department that its filing frequency has been changed from a monthly filer to an early filer.

Secondly, the taxpayer relies on the expertise of an outside tax service provider to file and pay the required taxes in a timely manner. Per the protest letter, it was not the

negligence of the taxpayer, but an error made by the taxpayer's tax service provider which resulted in the late payment of the withholding taxes due. This of course assumes the taxpayer initially did not receive the notification letter from the Department. The tax service provider has procedures in place to verify the filing frequency of their clients each month with the Department. In this instance, due to an error made by the tax service provider in the ID number in the records of the service provider, the verification of the filing frequency was not made.

In addressing the first concern, the Department finds that the letter notifying the taxpayer of the change in its filing frequency change was properly issued on January 2, 2003. This notification is based on the dollar amount of the taxpayer's monthly remittances. Per the Department's records, the notice was sent to the correct address and there is no indication that the letter was returned.

Finally, if it were not for the service provider's error in recording the taxpayer's ID number incorrectly in their records, the service provider would have received yet an additional notification that the filing frequency had changed. The service provider is acting in an agency capacity for the taxpayer with full authority to do so concerning the filing and payment of these taxes. The actions of the agent acting on behalf of the taxpayer are viewed the same as if they were the actions of the taxpayer itself.

IC 6-8.1-10-2.1 requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer."

IC 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed"

Taxpayer has not set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, reasonable cause has not been demonstrated as required to permit waiver of the penalty.

FINDING

The taxpayer's protest is denied.

RW/TG/DK 06/24/07